



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

May 5, 2021

VIA ELECTRONIC MAIL ONLY

To: Addressees on the Attached List

Re: In the Matter of the Gowanus Canal Superfund Site, Brooklyn, NY
Conference on Administrative Order Index No. CERCLA-02-2021-2010

The U.S. Environmental Protection Agency (EPA) issued the above-captioned Administrative Order for Remedial Action, Removal Action, and Remedial Design (Order) on March 29, 2021, to the City of New York (Respondent or City). Respondent requested a conference pursuant to Paragraph 123 of the Order. EPA held a Microsoft Teams virtual conference on April 29, 2021. A list of conference participants is attached.

I conducted the conference as an attorney in EPA's Office of Regional Counsel. My only prior involvement in this matter was (1) conducting a conference on May 2, 2019, concerning Administrative Order Index No. CERCLA-02-2019-2010, issued by EPA on April 11, 2019, and (2) conducting a conference on March 19, 2020, concerning Administrative Order Index No. CERCLA-02-2020-2003, issued by EPA on January 28, 2020. I have not otherwise been involved in the matter and was not involved in the preparation and issuance of the Order. Respondent was represented by counsel.

As described more fully in the Order itself, the Order requires Respondent to implement a portion of the remedy selected in EPA's September 27, 2013, Record of Decision (ROD) for the Site that includes the construction and operation of two Combined Sewer Overflow (CSO) retention tanks, the "RH-034 Tank" and the "OH-007 Tank," to control contaminated solids discharges. The Order also requires Respondent to timely perform a removal action to construct a bulkhead at property owned by Respondent to provide structural support for the dredging and capping of the Gowanus Canal (Canal) adjacent to that property as well as structural support for the construction of the OH-007 Tank. The Order includes new schedule requirements for the design of the OH-007 Tank.

Respondent began by stating its intent to comply with the CSO requirements in the ROD as well as the bulkhead requirements, but also stating that it has significant technical and legal issues as well as clarifying questions and comments regarding the Order. Respondent then noted that it has serious concerns regarding the schedule for completing the design of the OH-007 Tank, but that those concerns have been the subject of ongoing discussions with EPA and did not need to be stated in detail at the conference. The remainder of the conference focused primarily on Respondent's concerns with the subsections of Paragraph 73.

Respondent stated that one of its most significant issues relates to the requirements regarding stormwater in Paragraph 73(c) as well as 73(d) of the Order. Beginning with Paragraph 73(c), Respondent explained that it is proposing a unified stormwater rule that will encompass CSO areas and that it expects the proposed rule to be finalized by June 2022. Respondent provided some technical information regarding how the proposed rule differs from what was cited in the ROD and referenced in the Order. Respondent also explained that it believes that language in Paragraph 73(c) regarding sewage connection is not

necessary and will be a burden for Respondent, mentioning its recent Draft Environmental Impact Statement (DEIS) and the discussion of CSO projected flows and stormwater therein as well as citywide efforts to meet the requirements of the Clean Water Act (CWA) and municipal separate storm sewer system (MS4). Respondent requested that Paragraph 73(c) be modified to be consistent with Respondent's proposed rule. Respondent also took issue with Paragraph 73(c) requiring ROD standards "at minimum." Additionally, Respondent argued that Respondent has a regulation that is compliant, but that the federal government does not have the authority to require a municipality to enforce its own regulations.

EPA responded by stating that it is aware of the proposed rule and DEIS, but that the language in Paragraph 73(c) already accounts for changes that may be made through the inclusion of the phrase "as may be updated in City regulations and guidelines." EPA also stated its intention to make clear that the stormwater should be treated and discharged to the Canal rather than redirected to the combined sewer, as required under the ROD. EPA also stated that "at minimum" indicates a floor, meaning that Respondent does not need to do more than comply with applicable City regulations and guidelines, as may be updated. Put another way, EPA stated that as long as Respondent is willing to apply its own regulations, there should be no issue with Respondent complying with the first part of Paragraph 73(c).

The next issue Respondents raised concerns the separated sewers. Respondent stated that separating the sewers takes a significant amount of planning and that there are a significant number of challenges including the potential need to build sewers that are adjacent to the waterfront, the question of whether small separations near the water or a complete separation would be required, the potential for this to cause wholesale changes to MS4 treatment in the area, and concerns about how to build sewers given the existing infrastructure such as subways and utilities. EPA clarified that this separation requirement is meant to describe a scenario similar to the project undertaken by developer Lightstone for the first high-rise on the Canal.

In response to EPA's clarification, Respondent stated that Lightstone proposed and volunteered to create controls and that Respondent does not have the authority to mandate the types of separation implemented in the Lightstone project. Respondent said this requirement would create a regulatory issue for the New York State Department of Environmental Conservation (DEC) because, for example, a private developer that puts in its own stormwater sewage pipe would need a State Pollutant Discharge Elimination System (SPDES) permit for that outfall from DEC, and there could be inconsistency in overlapping City and State requirements. Respondent also expressed concern that the Lightstone project was a "one-off" and is not included in the drainage plan for the larger area. Respondent further expressed concern that Respondent could be required to maintain these systems even if they are constructed by private entities. Respondent stated it would be providing written correspondence to explain its concerns in detail with citations and requested a technical workshop to discuss this requirement and how it could be clarified in the Order.

EPA stated that, it has imposed similar requirements on property owners that have entered into bulkhead orders and that stormwater is discharged through the bulkhead to the canal with an EPA-approved treatment system which property owners are required to maintain. EPA stated that Respondent approved the Lightstone project and that no DEC involvement would be necessary. EPA discussed on-

property discharges and street end situations, such as when a street is rebuilt, to explain that this requirement is necessary to protect the overall remedy for the Site. EPA stated that Respondent's concerns about who would maintain these systems could be addressed with deed covenants. EPA stated that it would review any written correspondence related to this issue and any conflicts or inconsistencies, but that it would be appropriate for EPA to do so after the Order becomes effective. In response to Respondent's concern that this is a compliance issue, not a design issue, EPA stated that this concern is really no different from any other implementation question, characterized the concern as a "side-issue," and stated that Respondent could note this and other concerns in its notice of intent to comply.

Respondent also sought clarification of the annual reporting in Paragraph 73(c) and the quarterly reporting in Paragraph 73(b). Respondent explained the type of data Respondent will be collecting and approving in connection with its proposed unified rule and other requirements, as well as limitations due to the sensitivity of models. Respondent noted that load changes may not be able to be captured on an annual basis due to lag times between when Respondent approves designs and when developers build. In response, EPA stated that Respondent can submit the proposed form and contents of the report to EPA as stated in the last sentence of Paragraph 73(c). At that time, Respondent would discuss these potential issues and limitations. Issues with the quarterly reporting in Paragraph 73(b) could also be discussed.

The next issue Respondent raised concerns the requirements in Paragraph 73(d) for treatment units at separated stormwater outfalls, including street end discharges, at the Site. Respondent stated that adding these systems is not always possible after the fact. Respondent discussed issues with Vortechs units that were installed as part of the pilot study, expressing concern about the difficulty of installing and maintaining Vortechs units in the street because they require specific flows and can conflict with a number of other utilities. Respondent also noted that in the pilot study, there was no evidence that Vortechs units were any more effective than the standard catch basin. Respondent also expressed concern with the requirement for sampling of the units to report solids content, VOCs, SVOCs, and heavy metals because it believes this sampling goes beyond the contaminants of concern from the ROD.

EPA replied that only new outfalls are covered by the Order and explained that there is no requirement to retrofit. Indeed, Paragraph 73(d) is limited to outfalls "that are owned by or approved by Respondent after the Effective Date and are not otherwise covered by a DEC discharge permit." EPA also stated that the requirement is for treatment to catch oils in particular and that the Order does not require specific technology such as Vortechs. EPA also stated that there are only a handful of street ends that would be subject to this requirement.

Despite EPA's response, Respondent still maintained that there is an ambiguity in Paragraph 73(d) about whether the requirement applies to existing units, and that the language should be modified to clarify that this requirement only applies to newly constructed outfalls. Respondent also contended that this requirement is inconsistent with the National Contingency Plan (NCP) because nothing in the feasibility study (FS), FS amendment, or proposed plan discussed treatment on storm sewers so there was no evaluation of alternatives or NCP criteria.

EPA responded by observing that the overall goal of ensuring that recontamination does not occur is addressed on a global scale, and this requirement, which only applies to a handful of street ends, helps

prevent recontamination. EPA drew a comparison between addressing historic pipes as bulkheads are replaced and the requirement for treatment units at separated stormwater outfalls – neither is meant to be the major treatment. Instead, the RH-034 Tank and the OH-007 Tank are the major treatment.

Respondent next addressed the requirements for CSO solids monitoring in Paragraph 73(e) and 73(f), respectively. As for the monitoring, Respondent expressed concern about the timeframe, stating that because the in-Canal monitoring is supposed to begin one year after capping is completed, that monitoring may show contamination that has nothing to do with the CSOs. EPA agreed that timing is important, but explained that the intent is to collect data for several years, not just for one year.

As for the maintenance dredging, Respondent maintained that there is no standard that requires it to do maintenance dredging, and that maintenance dredging should not be imposed on Respondent when it could be the responsibility of National Grid. EPA explained that the requirement of maintenance dredging in the Order is not dredging for any and all purposes. Rather, it is to address the gap between when the tanks are online and when the dredging was done.

Respondent also stated that requiring monitoring for all CSO outfalls goes beyond the ROD, is not practical, and is unnecessary because the tanks are sized pursuant to the ROD requirement to account for expected population growth. Respondent stated that there is additional capacity in the target capture of the tanks, and that additional capacity exceeds requirements of the ROD. EPA responded that at the time of the ROD, EPA reviewed all of the outfalls at the Canal and concluded that the two largest outfalls needed to be controlled in a specific manner. Today, in light of the potential for large-scale development adding hundreds of new residential units, the impact of CSO discharge to one of the other CSOs (for example, the next largest at the end of Bond Street) may potentially become significant, by adding sanitary load and removing stormwater load in a manner that contributes a higher level of solids to the Canal. EPA based its decisions on the existing data, and the monitoring is important to determine the effectiveness of the remedy in the future.

Respondent concluded by reiterating its request that the Effective Date be modified so that all of the issues it raised during the conference could be discussed more fully and clarified before the Order becomes effective. Respondent stated that there is overlap between CERCLA and CWA, and that coordination on these issues is crucial.

After the conference, I conferred with Pat Evangelista, the Director of the Superfund and Emergency Management Division, regarding the summary of issues presented in this letter. Based on the summary of issues above and our discussion, Mr. Evangelista has determined that the Effective Date should be modified by two weeks. EPA does not see the need for a workshop or meeting and asks that the Respondent submit a writing to EPA discussing in more detail the concerns raised during the conference regarding the requirements specified in Paragraphs 73(b)-(f) within seven days or by May 12, 2021.

Pursuant to Paragraph 123 of the Order, the Order becomes effective seven days after the conference unless the effective date is modified by EPA. Thus, the Effective Date is Thursday, May 20, 2021. Pursuant to Paragraph 127, Respondent shall provide written notice to EPA stating whether it will comply with the terms of this Order seven days after the Effective Date, or by Thursday, May 27, 2021.

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As EPA stated at the conference, it is open to having further discussions with Respondent after the Order becomes effective, and Respondent can include notes in its notice of intent to comply as it deems necessary.

If you have any questions concerning the conference, please contact me at 212-637-3171 or deluca.kathryn@epa.gov. All other issues concerning the Site and the Order, including questions regarding Respondent's notice of intent to comply, should be addressed to Assistant Regional Counsel Brian Carr, who can be reached at (212) 637-3170 or carr.brian@epa.gov.

Sincerely,

Kathryn M. DeLuca
Assistant Regional Counsel

Enclosure

List of Attendees
April 29, 2021

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